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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1420

ANIELLO DELLACROCE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A, pp. A-1 to A-15) is reported at 491 F.2d 268.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 1974. On February 4, 1974, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including March

22, 1974. The petition was filed on March 21, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government carried its burden of establishing that the evidence on which petitioner's indictment was based was acquired independently of his testimony before a state grand jury under a grant of immunity.

2. Whether the evidence was sufficient to support the inference that certain stock constituted income to petitioner in 1968.

3. Whether the trial court abused its discretion in not requiring the government to disclose its prosecutorial investigative file on one of its witnesses.

STATUTES AND REGULATION INVOLVED

18 U.S.C. 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

26 U.S.C. 7201 and 7206(1) provide:

> Section 7201. Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.
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> Section 7206. Any person who—
>
> (1) Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter * * * shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

Section 1.451-2(a) of the Income Tax Regulations, 26 C.F.R. 1.451-2(a), provides:

> Income although not actually reduced to a taxpayer's possession is constructively received by him in the taxable year during which it is credited to his account, set apart for him, or otherwise made available so that he may draw upon it at any time, or so that he could have drawn upon it during the taxable year if notice of intention to withdraw had been given. However, income is not constructively received if the taxpayer's control of its receipt is subject to substantial limitations or restrictions.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of having unlawfully conspired with Michael Catalano and Martin Goldman to evade petitioner's 1968 federal income tax, in violation of 18 U.S.C. 371 (Count I); having willfully attempted to evade his 1968 federal income tax, in violation of 26 U.S.C. 7201 (Count II); and having willfully made and subscribed a false federal income tax return for 1968, in violation of 26 U.S.C. 7206(1) (Count III). Petitioner was sentenced to concurrent terms of five years' imprisonment on Counts I and II and three years' imprisonment on Count III and was fined $15,000. The court of appeals affirmed (Pet. App. A).

The court of appeals summarized the salient facts as follows (Pet. App. A, pp. A-3 to A-5):

> The gist of the conspiracy to enable Dellacroce to defraud the government of income taxes is that in 1968 Dellacroce allegedly received 22,500 shares of Yankee Plastics, Inc. stock (valued at approximately $123,000) for services rendered by Dellacroce and Catalano (1) to help Yankee Plastics, Inc. acquire a company known as Mr. Hanger, Inc. and (2) to insure "labor peace" for Mr. Hanger, Inc. In order to avoid showing this stock as income to Dellacroce (and hence to evade a tax to him), devious means were employed. The 22,500 shares were placed in the name of a nominee, Preston Smith. The certificates representing these shares were never in

the physical possession of Dellacroce. Thus the government's case is based upon his dominion and control of the shares and his resultant constructive possession.

To trace the physical custody of the 22,500 shares requires the introduction of other persons, Rosen, Goldman, Terranova and Catalano.

Rosen and Goldman, using Preston Smith as a nominee, purchased 15,000 shares of Mr. Hanger, Inc. which, upon its merger with Yankee Plastics, became 22,500 shares of that company's stock. In the summer of 1968, Goldman told Terranova, the government's chief witness and through whom these transactions became known, that the shares were being held for Dellacroce in Smith's name so that Dellacroce would not have to report them as income. Goldman requested Terranova to replace Smith as nominee. Accordingly, the single certificate for the 22,500 shares in Smith's name was cancelled and forty-five 500-share certificates, issued in Smith's name but endorsed by Smith with a signature guarantee, were delivered by Goldman to Terranova. The stock was now in negotiable form.

Goldman and Terranova then opened an account, still using Smith's name, with Francis I. duPont and Company and deposited the 22,500 shares there.

Catalano enters the picture, according to Terranova's testimony, as an accomplice and employee of Dellacroce.

During the ensuing months, there were many meetings between Goldman and Terranova on the one hand and Dellacroce and Catalano on the other, at which the stock, still in the brokerage account, was discussed. Dellacroce was ad-

vised not to sell since it was thought that Yankee Plastics was doing well. However, the stock was eventually removed from the duPont account and kept in offices at 312 Fifth Avenue, maintained by a company operated by Goldman and Terranova. In May 1969 they (Terranova and Goldman) put 7,500 shares into an account with First Hanover Corporation. In June 1969 4,000 shares were sold, realizing some $21,000.[1] The remaining 3,500 shares were delivered to Terranova. In November 1969 the balance of the 22,500 shares (37 certificates for 500 shares each) were delivered into the custody of a private attorney, and in March 1971 they were released to Terranova's wife who, in turn, gave them to Goldman. The 37 certificates finally reappeared via Goldman's attorney at the trial, ostensibly from Goldman.

The theory of the government's case is that Dellacroce received the stock in 1968 in payment for services rendered by him and his assistant, Catalano, to insure labor "peace" and to aid in the merger of Mr. Hanger and Yankee Plastics. Despite the many resting places of the stock and the inferentially suspicious character of the methods employed, the fundamental appellate question is centered around the testimony that the stock was given to Dellacroce for his serv-

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[1] [Respondent's footnote.] Goldman and Terranova sold these 4,000 shares on the advice and assurance of Rosen that he would replace them. The money was needed to pay legal fees for petitioner and Catalano and to solve financial problems of a corporation controlled by Terranova and Goldman (App. 126a-128a, 226a-258a, 372a-373a, 709a,710a, 745a; Govt. Exs. 6, 7a-7h, 9, 21, 22). ("App." refers to the appendix filed in the court of appeals.)

> ices and was handled in such a way as would enable him to evade income taxes thereon. There was much embellishing proof which would support inferences to this effect but essentially the case rests upon jury belief or disbelief in Terranova's testimony. It chose to believe. It also chose to believe the involvement of Goldman and Catalano. * * *

Petitioner had moved to dismiss the indictment on the ground that it was tainted by information acquired by the federal prosecutor while the latter had, in his former capacity as a state prosecutor, conducted a New York County grand jury investigation in the course of which petitioner had testified under a grant of immunity. After an extensive hearing, the district court denied this motion. The government's point-by-point refutation of the contentions made by petitioner with respect to this motion are set forth in the Appendix, *infra*, pp. 12-19.

ARGUMENT

1. Petitioner contends here (Pet. 6-14), as he did in the court of appeals, that "[t]he government failed to affirmatively establish an independent source of evidence for petitioner's federal indictment after he had been granted transactional immunity and testified fully before a state grand jury" (Pet. 6). We believe that this general contention is fully answered by the excerpt from the government's court of appeals brief which is set forth in the Appendix, *infra*, pp. 12-19. The court of appeals, applying the proper scope of review under *Kastigar* v. *United States*, 406

U.S. 441, concluded that the government had successfully "carried the affirmative burden of proving a legitimate, wholly independent source of evidence" (Pet. App. A, p. A-6).[2] The question petitioner seeks to raise is an essentially factual one that warrants no further review.[3]

2. Petitioner further contends (Pet. 14-16), in effect, that the district court erred in letting the evidence of his constructive receipt of the Yankee Plastics stock go to the jury, because the stock was being "held in trust for someone else" (Pet. 14).[4] For whom the stock was being held was of course the central factual issue in the case. At trial the government offered the evidence summarized above (pp. 4-7, *supra*) and also showed that petitioner made all the decisions regarding disposition of the stock

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[2] The court below was therefore applying the same scope of review as the courts in *United States* v. *McDaniel*, 482 F. 2d 305 (C.A. 8), and *United States* v. *Seiffert*, 463 F. 2d 1089 (C.A. 5). There is thus no conflict between those decisions and the instant case; the difference in results stems merely from different facts.

[3] Petitioner apparently contends (Pet. 11) that the court of appeals assumed that the decision in *Kastigar* does not bar use of compelled testimony at a subsequent trial. That contention is frivolous; the court of appeals restricted its analysis to the use of compelled testimony at the indictment stage simply because that was the only *Kastigar* issue that petitioner raised on appeal.

[4] He also suggests (Pet. 16) that the issuance of an SEC stop order in November 1968 precluded his receipt of taxable income; that stop order was irrelevant to his taxability on the prior constructive receipt of the shares; moreover, the shares retained substantial value even after issuance of the order, as the subsequent sales showed.

(App. 186a-189a, 191a-195a, 197a-201a, 224a-225a).[5] This evidence was sufficient to permit the issue of constructive receipt to go to the jury.

3. Petitioner's final contention (Pet. 17-19), that the trial court abused its discretion in not requiring the government to disclose its prosecutorial investigative file on one of its witnesses and to provide certain other information, was fully answered by the court of appeals in language upon which we rely (Pet. App. A, pp. A-10 to A-11):[6]

> Finally, Dellacroce contends that the government improperly withheld information that would have helped to impeach Terranova, the government's chief witness. The information consisted of a government file on Terranova, gathered in relation to an unconnected bribery indictment against him, the records of Jody Associates, which also related to this indictment, and the logs of surveillance made in 1967 and 1968 on the Ravenite Club, a meeting place of the alleged conspirators. In addition there is a claim of error in regard to sustaining a government objection to a defense question put to Terranova in an attempt to impeach him. To deal with the files relating to the bribery indictment, the trial court, after a representation by the gov-

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[5] Petitioner offered no evidence in rebuttal.

[6] *Davis* v. *Alaska*, No. 72-5794, decided February 27, 1974, on which petitioner relies (Pet. 19), is wholly inapposite. That case involves the validity of a protective order limiting the scope of cross-examination, not the confidentiality of prosecutorial investigative files under the Jencks Act.

ernment that their file contained nothing on the defendant's guilt or innocence, and after its own inspection of the corporate files which also revealed nothing, denied the request for inspection. There is no doubt that this decision was proper. The defense had had a full opportunity to examine Terranova at length concerning his alleged misdeeds. There was no abuse of discretion in the judge's preventing another case being tried in his court as part of an attempt to impeach a witness.

The surveillance logs, which were requested under 18 U.S.C. § 3500, the Jencks Act, are related to the testimony in this trial of the agent who prepared them. He testified on his own recollection that the defendants frequented the Ravenite Club. The defense wanted the logs in an attempt to prove that Dellacroce did not attend the Ravenite Club on a particular occasion with Goldman, a meeting testified to by Terranova. The judge denied the request for inspection of these logs on the grounds that they were not verbatim or substantially verbatim reports of statements made by a witness as required by § 3500. The purpose of the Jencks Act was to provide the defense with the means of impeaching a government witness by means of a prior inconsistent statement, *United States* v. *Aaron*, 457 F.2d 855 (2d Cir. 1972), while not allowing an unrestrained search through government files. The determination of whether a particular document is within the ambit of § 3500 is ordinarily one for the trial court whose ruling should not be disturbed unless clearly erroneous, *Canaday* v. *United States*, 354 F.2d 849 (8th Cir. 1966).

In this instance, since the Agent did not testify that Dellacroce was present at the time stated by Terranova, the logs would be useless to impeach the Agent on this point. Further, these documents were not used to refresh the witness's memory before his testimony. The witness, in fact, admitted that he did not recall certain matters that could be found in the logs. Thus, it may be seen that these research surveillance logs are of the same nature as the Agent's diary as to the people he met with which has been held to be outside § 3500 in *Canaday* v. *United States*, 354 F.2d 849 (8th Cir. 1966). Therefore, there was no error here.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1974.

APPENDIX

EXCERPT FROM GOVERNMENT'S BRIEF (pp. 27-33) IN COURT OF APPEALS RELATING TO PETITIONER'S MOTION TO DISMISS INDICTMENT

A hearing on Dellacroce's motion to dismiss the indictment, on the ground that it was based on testimony and leads from testimony given under a grant of immunity, showed the following: William I. Aronwald, a special attorney for the Department of Justice who tried this case, had previously been an Assistant District Attorney in New York County and in that capacity examined Dellacroce before the New York County grand jury in March, 1970 (8a-10a). Aronwald later joined the Department of Justice in July, 1971, and, in November or December, 1971, after about sixty percent of the grand jury presentation in this prosecution was concluded, was assigned to this case (11a-13a).[1]

In his motion to dismiss, Dellacroce specified certain parts of his testimony before the New York County grand jury that allegedly could have provided leads in connection with this prosecution (13a-16a). Aronwald testified that except for one answer in this specified testimony, he had prior knowledge of everything Dellacroce testified to. That this was the case was corroborated by the fact that in each instance

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[1] Aronwald testified that *prior* to Dellacroce's grand jury appearance in March, 1970, he held a conference with the federal authorities, but that after Dellacroce's testimony he never disclosed its contents to any federal agents or attorneys. Dellacroce's grand jury testimony was made public, however, when he was indicted for contempt in July, 1970, and tried and convicted in March, 1971.

either the question put to Dellacroce was a leading one which showed that Aronwald already knew the answer, or the very record below reveals a source for the information that antedated Dellacroce's testimony. Moreover, certain leading questions produced denials from Dellacroce and obviously could have provided no leads. The 23 specified questions and answers, and the independent sources of the information contained in the answers, are as follows: [2]

1. "Q By whom are you employed? A. By Martin Goldman."

* * * * *

2. Q. Alright Mr. Dellacroce, I have explained to you outside in the presence of your counsel. Royal Crown Bottling Company of Newark, is a corporation in which 20th Century Industries Incorporated is a New York Based Corporation which has interests. Martin Goldman is President of Royal Crown Bottling Company of Newark, now known as the Hoffman Beverage Company, he is at recent time the Vice-President of 20th Century Industries Incorporated, and his own assistants control shares in other companies. A. I know nothing on that, I couldn't tell you that there is definitely a connection with the New York—

* * * * *

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[2] The questions and answers were specified in Dellacroce's affidavit in support of his motion to dismiss the indictment, appearing at pages 12a-17a of the joint appendix. There are some (insignificant) inaccuracies therein, therefore, this brief quotes the questions from the minutes of Dellacroce's state grand jury testimony.

3. "Q. How long have you known Martin Goldman? A. Goldman, 4, 5, 6 years.

4. Q. How did you first meet Martin Goldman? A. I met Martin Goldman through Mike Catalano.

5. Q. Did you ever discuss with Martin Goldman any of the business affairs of any corporation in which he had an interest? A. No, sir."

The first, third and fourth answers duplicated information already contained in an affidavit by the defendant Goldman, dated September 25, 1969, excerpts from which affidavit were introduced at trial (322a-324a; GX. 13). Further, Aronwald testified at the hearing on Dellacroce's motion that he had corporate records of Royal Crown that showed Dellacroce on the payroll and that he had learned this information from an interview he had with Goldman before Dellacroce's grand jury appearance (16a, 19a). Goldman also had been interviewed on November 3, 1969, by an FBI agent and at that time revealed that he knew Dellacroce through Catalano, and that Dellacroce worked for Royal Crown (1332a-1336a). That interview, in turn, confirmed Goldman's still earlier testimony before the State Investigation Commission (which Aronwald had read) on January 8, 1969, during which he testified that Dellacroce worked for Royal Crown (1620a-1621a). All of these prior and independent sources revealed the relationship between Goldman and Dellacroce. The second and fifth questions are leading questions that elicited denials and claims of ignorance, not information.

6. "Q. Did you ever discuss with Martin Goldman any of the matters pertaining to Mr.

Hanger, Inc., or Yankee Plastics Inc.? A. What was that?

7. Q. We are asking you, whether or not you ever discussed with Martin Goldman any of the affairs involving either of those corporations? That's all we're asking you at this time. A. No, sir. I don't think I have. No I didn't ever discuss any of the businesses with Martin Goldman".

* * * * *

8. "Q. Do you know Frank Terranova, do you understand that? A. The name doesn't ring a bell to me."

The sixth, seventh and eight questions were leading questions that elicited denials and claims of ignorance, not information.

9. "Q. Alright, have you ever met Martin Goldman at the Ravenite Social Club? A. Yes, sir.

10. Q. How many times did you say you met Martin Goldman at the Ravenite Social Club? A. Many, many times.

11. Q. When was the last time you met Martin Goldman at the Ravenite Social Club? A. I don't think he's been there for a long time, ever since he started getting arrested by the F.B.I., and I don't I've been there in a long time. Exactly, I couldn't tell you.

12. Q. When was the last time you met Martin Goldman or saw Martin Goldman? A. I seen him at Mike's house. He goes to Mike's house. Seen at Mike's—

13. Q. When was the last time— A. I saw him a couple of weeks ago, seen him in the neighborhood. I don't—he wasn't up there.

14. Q. How did you say you first met Martin Goldman? Through Mr. Mike Catalano, is that correct? A. That's right.

15. Q. And, have you ever received any money from Martin Goldman? A. I work for him.

16. Q. Beside your salary, at any time did you receive any money from Martin Goldman? A. No, sir.

17. Q. You know Larry Rosen? A. Who?

18. Q. Larry Rosen. A. I told you when it comes to names, I can't answer direct. I can't give a direct answer on names, because like I say, I might say no and then if you put the fellow in front of my face, I know him. I know a lot of people, I know a lot of people by first names and nicknames, let's put it that way.

19. Q. Well, anyway, did you ever tell Larry Rosen, or Martin Goldman, or anyone that you wanted Mike Catalano put on the payroll of Mr. Hanger? A. I did not."

Questions 9, 10 and 11 were leading questions which showed that Aronwald already was aware that Dellacroce and Goldman had met at the Ravenite Social Club. This apparent prior knowledge is confirmed by at least four independent and prior sources: (i) Goldman's January 8, 1969, State Investigation Commission testimony, introduced at trial (1620a-1623a), in which Goldman testified that he had met with Dellacroce at the Ravenite Social Club, and

that Catalano lived across the street from the club; (ii) the November 3, 1969, interview of Goldman by the FBI during which Goldman said he had met Dellacroce through Catalano and that he had on occasion met with Dellacroce and Catalano at the Ravenite Social Club (1332a-1337a); (iii) the December 16, 1966, interview of Goldman by the FBI during which Goldman said he would reach Dellacroce by calling Dellacroce at the Ravenite Social Club during 1967 (1636a-1639a). Aronwald testified at the hearing he was aware of Goldman's State Investigation Commission testimony and Dellacroce's meetings with Goldman at the Ravenite Social Club before Dellacroce testified (19a, 22a-23a).

Questions 12 and 13 elicited the only information admittedly unknown to Aronwald before Dellacroce's grand jury appearance—that Dellacroce had met with Goldman two weeks before the date he testified (77a). Yet that meeting is innocuous on its face and followed the events that gave rise to this prosecution.

The answers to questions 14 and 15 duplicate the information in the answers to questions 4 and 1, respectively (25a-26a). Questions 16-19 elicited denials and claims of ignorance, not information.

> 20. "Q. Have you ever been up to the offices of 20th Century Industries at 312 Fifth Avenue? A. I don't—I might have been there once, twice at the most.
>
> 21. Q. Well, now, you were there, in what connection? A. I was with Mike Catalano.
>
> 22. Q. To do what? A. Nothing in particular.
>
> 23. Q. How did you get up there? A. I met Martin Goldman, and I met other people with

some relatives of other people, I don't know them."

Question 20 shows Aronwald already had some information indicating Dellacroce's presence in the offices of 20th Century. Aronwald testified at the hearing that this information had come from other witnesses (29a). Furthermore, the government knew that Dellacroce worked for Goldman at Royal Crown and that Catalano introduced them. That Dellacroce and Catalano visited the offices of Twentieth Century Industries to see Goldman added little if anything to these facts. Moreover, Dellacroce's concession that he had visited the offices of 20th Century must be related to his other grand jury testimony about 20th Century to determine whether it could conceivably have provided any leads. Dellacroce testified before the grand jury that he did not know anything about 20th Century other than what he had heard during his grand jury appearances, presumably from prosecutors, and suggested he was not even aware of its location (Dellacroce G.J. 892).[3] He testified he was there with Catalano to do nothing in particular (Dellacroce G.J. 903-904). Finally, it was Aronwald not Dellacroce who stated on the record before the grand jury what the relationship was among 20th Century, Royal Crown and Goldman (Dellacroce G.J. 886). It is thus inconceivable that Dellacroce's testimony that he visited the offices of 20th Century could have provided any leads with respect to this case.

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[3] These page references are to Dellacroce's grand jury testimony as it is reproduced in the appendix he submitted on his appeal from the state conviction for contempt. *People* v. *Dellacroce*, (New York Clerk's Indictment No. 2005/1970), Appellant's Appendix, Vol. III, pp. 860-992.

In sum, Dellacroce's responses before the New York County grand jury scarcely rise to the level of testimony about "matters related to the federal prosecution. . . ." *Murphy* v. *Waterfront Comm'n.*, *supra*. Even if they did, the very questions asked, as well as Aronwald's testimony at the hearing on Dellacroce's motion below, Goldman's September, 1969, affidavit and January, 1969, SIC testimony, FBI interviews with Goldman and FBI surveillance make it abundantly clear that Aronwald was aware of every scrap of information testified to (and occasionally denied) by Dellacroce, the only exception being Dellacroce's meeting with Goldman two weeks before his grand jury appearance, which meeting postdated the events giving rise to this prosecution. The Government's evidence at trial was untainted by any use of Dellacroce's grand jury testimony.

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